

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,

Plaintiff,

v.

EXPEDIA, INC.,

Defendant.

Case No. 2:19-cv-00896

STIPULATED PROTECTIVE ORDER

~~PROPOSED~~

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of confidential, proprietary, or private information for which special protection may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

2. "CONFIDENTIAL" MATERIAL

"Confidential" material shall include the following documents and tangible things produced or otherwise exchanged:

STIPULATED PROTECTIVE ORDER-~~PROPOSED~~ - 1

JENSEN MORSE BAKER PLLC
1809 SEVENTH AVENUE, SUITE 410
SEATTLE, WASHINGTON 98101
PHONE: 206.682.1550

- Documents regarding *Buckeye Tree Lodge and Sequoia Village Inn, LLC, et al v. Expedia, Inc., et al*, United States District Court for the Northern District of California Case No. 3:16-cv-04721-VC (the “Underlying Lawsuit”) maintained by Expedia, Inc.;
- Documents contained within the claim file regarding the Underlying Lawsuit maintained by National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”);
- Documents contained with the underwriting file maintained by National Union regarding the insurance policy at issue; and
- Documents relating to National Union’s claims handling processes.

3. SCOPE

The protections conferred by this agreement cover not only confidential material (as defined above), but also (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material.

However, the protections conferred by this agreement do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.

4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

4.1 Basic Principles. A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Confidential material may be disclosed only to the categories of persons and under the conditions described in this agreement. Confidential material must be stored and maintained by a receiving party at a location and in a secure manner that ensures that access is limited to the persons authorized under this agreement.

1 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
2 ordered by the court or permitted in writing by the designating party, a receiving party may
3 disclose any confidential material only to:

4 (a) the receiving party's counsel of record in this action, as well as
5 employees of counsel to whom it is reasonably necessary to disclose the information for this
6 litigation;

7 (b) the officers, directors, claims administrators, and employees (including
8 in house counsel) of the receiving party to whom disclosure is reasonably necessary for this
9 litigation, unless the parties agree that a particular document or material produced is for
10 Attorney's Eyes Only and is so designated;

11 (c) experts and consultants to whom disclosure is reasonably necessary for
12 this litigation and who have signed the "Acknowledgment and Agreement to Be Bound"
13 (Exhibit A);

14 (d) the court, court personnel, and court reporters and their staff;

15 (e) copy or imaging services retained by counsel to assist in the duplication
16 of confidential material, provided that counsel for the party retaining the copy or imaging
17 service instructs the service not to disclose any confidential material to third parties and to
18 immediately return all originals and copies of any confidential material;

19 (f) during their depositions, witnesses in the action to whom disclosure is
20 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be
21 Bound" (Exhibit A), unless otherwise agreed by the designating party or ordered by the court.
22 Pages of transcribed deposition testimony or exhibits to depositions that reveal confidential
23 material must be separately bound by the court reporter and may not be disclosed to anyone
24 except as permitted under this agreement;

25 (g) the author or recipient of a document containing the information or a
26 custodian or other person who otherwise possessed or knew the information.

1 4.3 Filing Confidential Material. Before filing confidential material or discussing or
2 referencing such material in court filings, the filing party shall confer with the designating
3 party, in accordance with Local Civil Rule 5(g)(3)(A), to determine whether the designating
4 party will remove the confidential designation, whether the document can be redacted, or
5 whether a motion to seal or stipulation and proposed order is warranted. During the meet and
6 confer process, the designating party must identify the basis for sealing the specific confidential
7 information at issue, and the filing party shall include this basis in its motion to seal, along with
8 any objection to sealing the information at issue. Local Civil Rule 5(g) sets forth the
9 procedures that must be followed and the standards that will be applied when a party seeks
10 permission from the court to file material under seal. A party who seeks to maintain the
11 confidentiality of its information must satisfy the requirements of Local Civil Rule 5(g)(3)(B),
12 even if it is not the party filing the motion to seal. Failure to satisfy this requirement will result
13 in the motion to seal being denied, in accordance with the strong presumption of public access
14 to the Court's files.

15 5. DESIGNATING PROTECTED MATERIAL

16 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
17 party or non-party that designates information or items for protection under this agreement
18 must take care to limit any such designation to specific material that qualifies under the
19 appropriate standards. The designating party must designate for protection only those parts of
20 material, documents, items, or oral or written communications that qualify, so that other
21 portions of the material, documents, items, or communications for which protection is not
22 warranted are not swept unjustifiably within the ambit of this agreement.

23 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
24 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to
25 unnecessarily encumber or delay the case development process or to impose unnecessary
26 expenses and burdens on other parties) expose the designating party to sanctions.

1 If it comes to a designating party's attention that information or items that it designated
2 for protection do not qualify for protection, the designating party must promptly notify all other
3 parties that it is withdrawing the mistaken designation.

4 5.2 Manner and Timing of Designations. Except as otherwise provided in this
5 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
6 ordered, disclosure or discovery material that qualifies for protection under this agreement must
7 be clearly so designated before or when the material is disclosed or produced.

8 (a) Information in documentary form: (*e.g.*, paper or electronic documents
9 and deposition exhibits, but excluding transcripts of depositions or other pretrial or trial
10 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that
11 contains confidential material. If only a portion or portions of the material on a page qualifies
12 for protection, the producing party also must clearly identify the protected portion(s) (*e.g.*, by
13 making appropriate markings in the margins).

14 (b) Testimony given in deposition or in other pretrial proceedings: the
15 parties and any participating non-parties must identify on the record, during the deposition or
16 other pretrial proceeding, all protected testimony, without prejudice to their right to so
17 designate other testimony after reviewing the transcript. Any party or non-party may, within
18 fifteen days after receiving the transcript of the deposition or other pretrial proceeding,
19 designate portions of the transcript, or exhibits thereto, as confidential. If a party or non-party
20 desires to protect confidential information at trial, the issue should be addressed during the pre-
21 trial conference.

22 (c) Other tangible items: the producing party must affix in a prominent place
23 on the exterior of the container or containers in which the information or item is stored the
24 word "CONFIDENTIAL." If only a portion or portions of the information or item warrant
25 protection, the producing party, to the extent practicable, shall identify the protected portion(s).

26 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
27 designate qualified information or items does not, standing alone, waive the designating party's
STIPULATED PROTECTIVE ORDER-~~PROPOSED~~- 5

1 right to secure protection under this agreement for such material. Upon timely correction of a
2 designation, the receiving party must make reasonable efforts to ensure that the material is
3 treated in accordance with the provisions of this agreement.

4 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
6 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
7 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
8 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
9 challenge a confidentiality designation by electing not to mount a challenge promptly after the
10 original designation is disclosed.

11 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
12 regarding confidential designations without court involvement. Any motion regarding
13 confidential designations or for a protective order must include a certification, in the motion or
14 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer
15 conference with other affected parties in an effort to resolve the dispute without court action.
16 The certification must list the date, manner, and participants to the conference. A good faith
17 effort to confer requires a face-to-face meeting or a telephone conference.

18 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
19 intervention, the designating party may file and serve a motion to retain confidentiality under
20 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of
21 persuasion in any such motion shall be on the designating party. Frivolous challenges, and
22 those made for an improper purpose (e.g., to harass or impose unnecessary expenses and
23 burdens on other parties) may expose the challenging party to sanctions. All parties shall
24 continue to maintain the material in question as confidential until the court rules on the
25 challenge.

26 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
27 LITIGATION

STIPULATED PROTECTIVE ORDER ~~[PROPOSED]~~ - 6

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1 If a party is served with a subpoena or a court order issued in other litigation that
2 compels disclosure of any information or items designated in this action as
3 “CONFIDENTIAL,” that party must:

4 (a) promptly notify the designating party in writing and include a copy of
5 the subpoena or court order;

6 (b) promptly notify in writing the party who caused the subpoena or order to
7 issue in the other litigation that some or all of the material covered by the subpoena or order is
8 subject to this agreement. Such notification shall include a copy of this agreement; and

9 (c) cooperate with respect to all reasonable procedures sought to be pursued
10 by the designating party whose confidential material may be affected.

11 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

12 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
13 confidential material to any person or in any circumstance not authorized under this agreement,
14 the receiving party must immediately (a) notify in writing the designating party of the
15 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
16 protected material, (c) inform the person or persons to whom unauthorized disclosures were
17 made of all the terms of this agreement, and (d) request that such person or persons execute the
18 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

19 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
20 MATERIAL

21 When a producing party gives notice to receiving parties that certain inadvertently
22 produced material is subject to a claim of privilege or other protection, the obligations of the
23 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
24 provision is not intended to modify whatever procedure may be established in an e-discovery
25 order or agreement that provides for production without prior privilege review. The parties
26 agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

27 10. NON TERMINATION AND RETURN OF DOCUMENTS

STIPULATED PROTECTIVE ORDER ~~[PROPOSED]~~ - 7

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1 Within 60 days after the termination of this action, including all appeals, each receiving
2 party must return all confidential material to the producing party, including all copies, extracts
3 and summaries thereof. Alternatively, the parties may agree upon appropriate methods of
4 retention or destruction.

5 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
6 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,
7 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert
8 work product, even if such materials contain confidential material.

9 The confidentiality obligations imposed by this agreement shall remain in effect until a
10 designating party agrees otherwise in writing or a court orders otherwise.

11
12 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

13 DATED: January 29, 2020

JENSEN MORSE BAKER PLLC

14
15 By s/ Gabriel Baker

Gabriel Baker, WSBA No. 28473

16 Benjamin J. Roesch, WSBA No. 39960

17 Attorneys for Plaintiff National Union
18 Fire Insurance Company of Pittsburgh, Pa.

19 DATED: January 29, 2020

GORDON TILDEN THOMAS & CORDELL
LLP

20
21 By Susannah S. Carr

Susannah Carr, WSBA No. 38475

22 Franklin D. Cordell, WSBA No. 26392

23 Guinevere Becker Bogusz, WSBA No. 52937

24 Attorneys for Defendant Expedia, Inc.

25 PURSUANT TO STIPULATION, IT IS SO ORDERED

26 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of
27 any documents in this proceeding shall not, for the purposes of this proceeding or any other
STIPULATED PROTECTIVE ORDER ~~[PROPOSED]~~ - 8

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1 federal or state proceeding, constitute a waiver by the producing party of any privilege
2 applicable to those documents, including the attorney-client privilege, attorney work-product
3 protection, or any other privilege or protection recognized by law.

4
5 DATED: January 31, 2020.

Robert S. Lasnik

Honorable Robert S. Lasnik
United States District Court Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty
of perjury that I have read in its entirety and understand the Stipulated Protective Order that
was issued by the United States District Court for the Western District of Washington on [date]
in the case of *National Union Fire Insurance Company of Pittsburgh, Pa. v. Expedia, Inc.*,
Case No. 2:19-cv-00896 RSL. I agree to comply with and to be bound by all the terms of this
Stipulated Protective Order and I understand and acknowledge that failure to so comply could
expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I
will not disclose in any manner any information or item that is subject to this Stipulated
Protective Order to any person or entity except in strict compliance with the provisions of this
Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Western District of Washington for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____